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In the Supreme Court of the United States

OCTOBER TERM, 1986

CHAIM BABAD, BERNARD STEINMETZ AND EMANUEL STEINMETZ, A CO-PARTNERSHIP d/b/a J.R.R. REALTY CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the National Labor Relations Board was not collaterally estopped from finding that petitioner had assumed its predecessor's collective bargaining agreement.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 785 F.2d 46. The decision and order of the National Labor Relations Board (Pet. App. A11-A33) are reported at 273 N.L.R.B. 1523.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1986. A petition for rehearing was denied on April 8, 1986. The petition for a writ of certiorari was filed on July 3, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a partnership doing business as J.R.R. Realty Co., purchased an apartment building in Queens, New York, which was owned by JARU Properties, Inc., and ASCR Realty, Inc., and managed by J.A.R. Management Corp. (J.A.R.). J.A.R. had entered into a collective bargaining agreement with Local 32B-32J, Service Employees International Union, AFL-CIO, covering the six service employees who worked at the apartment building. Pet. App. A17. The collective bargaining agreement contained a provision stating that if J.A.R. sold the apartment building it would, as a condition of sale, require the purchaser to agree in writing to adopt the agreement and to offer employment to all of the service employees (*id.* at A3).

The sale contract between the prior owners and petitioner's nominee, Joshua Estates, provided that the purchaser would take title subject to certain "permitted encumbrances," including "union contracts." The collective agreement between the union and J.A.R. was listed as such an encumbrance, and a copy of the agreement was attached to the sale contract. At the title closing, Joshua Estates executed an assignment of the sale contract to petitioner. At the same time, the former owners and J.A.R. specifically assigned to petitioner their rights and obligations under the collective bargaining agreement between J.A.R. and the union. Pet. App. A3-A4.[1]

On April 1, 1981, the day following the closing of title on the apartment building, petitioner's partner, Chaim Babad, came to the building and announced that the six employees

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[1]Joshua Estates and petitioner also executed an indemnity agreement providing that title to the building was subject to all obligations of the sellers under the leases, contracts, and agreements in effect on the closing date, and that petitioner would hold the sellers harmless from any claims and liabilities arising thereunder (Pet. App. A4).

formerly employed by J.A.R. were discharged as of that day. Babad offered those employees money to give up their jobs, informing them that he could not pay union wages and that he wanted to deal with them rather than the union. Babad threatened to cut off one employee's utilities and evict him from the building if he did not accept the offer. Ultimately all of the employees agreed to petitioner's demands. Pet. App. A4-A5, A18-A21.

2. The union filed charges with the National Labor Relations Board alleging that petitioner had unlawfully refused to recognize and bargain with it, had negotiated individually with the employees, and had discharged them because of their union membership. The union also filed in state court a notice of intention to arbitrate against petitioner and J.A.R. (Pet. App. A5 n.3, A16 n.3). The New York Supreme Court granted petitioner's motion to vacate the arbitration notice, finding that petitioner had not agreed to submit to arbitration and that, in any event, the state court was deprived of jurisdiction because of the pending unfair labor practice proceeding.[2] The New York Supreme Court,

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[2]The memorandum decision of the New York Supreme Court states in its entirety (citations omitted):

> This is a motion by petitioners for a judgment vacating the annexed notice of intention to arbitrate.
>
> The movant does not deny that it is the successor in interest to J.A.R. Management Corp. There is nothing before this court to indicate that J.R.R. Realty Co. was a signator of the agreement of collective bargaining, nor is there an indication in writing that J.R.R. Realty Co. had agreed with J.A.R. Management Corp., its predecessor in interest, to adopt the provision of the agreement between J.A.R. and Local 32B-32J, Service Employees International Union ("Union").
>
> The law is clear and cases are legion that no one is under a duty to submit to arbitration unless by clear language he has so agreed. Moreover, as herein indicated, the Union submitted the same issue of unfair labor practice to the National Labor Relations

Appellate Division, affirmed the order vacating the notice as to petitioner. *J.A.R. Management Corp.* v. *Sweeney*, 86 A.D.2d 596, 446 N.Y.S.2d 193 (1982).[3]

In the unfair labor practice proceeding, the Board found, in agreement with the administrative law judge, that petitioner violated Section 8(a)(3) and (1) of the Act (29 U.S.C. 158(a)(3) and (1)) by discharging all of the service employees formerly employed by J.A.R. because of their membership in and support of the union (Pet. App. A25, A28). The Board also found, in agreement with the administrative law judge, that petitioner was a successor employer to J.A.R. and, as such, violated Section 8(a)(5) and (1) of the Act (29 U.S.C. 158(a)(5) and (1)) by refusing to bargain with the union as the representative of the building services employees; by bargaining directly with the building services employees and bypassing the union; by refusing to honor the collective bargaining agreement between J.A.R. and the union, which the Board found petitioner had adopted; and by discharging all of the building service employees in

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Board. Accordingly, a State court is deprived of jurisdiction over the matter and the Union may not obtain arbitration on the same question.

Accordingly, the motion is granted. Settle judgment.

[3]The Appellate Division stayed the arbitration, pending disposition of the unfair labor practice proceeding, as to J.A.R. The court stated (446 N.Y.S.2d at 194, (citations omitted)):

> While it is true that an NLRB proceeding ordinarily preempts an arbitration proceeding, in this case, the NLRB cannot provide the union with relief against J.A.R. At best, the labor relations disposition will resolve the merits of the union's claims against J.R.R., including the latter's contention that it is not bound by J.A.R.'s contract with the union. The NLRB, however, cannot resolve the union's claims against J.A.R. for failing to give notice, nor can it provide relief against J.A.R. should it determine that the contract of sale did not bind J.A.R. to the terms of the collective bargaining agreement.

violation of the collective bargaining agreement between J.A.R. and the union (Pet. App. A22-A25, A27-A28).

In finding that petitioner had adopted the collective bargaining agreement, the Board noted that the contract of sale specifically provided that the purchaser took subject to that agreement, that petitioner had assumed all obligations of the purchaser under the contract of sale, and that petitioner agreed to take title subject to existing contracts then in effect. The Board concluded that "[b]y these undertakings and assumptions, [petitioner] succeeded the seller of the building with respect to obligations under the collective bargaining agreement" (Pet. App. A23).

3. The court of appeals upheld the Board's decision (Pet. App. A7), finding it to be supported by substantial evidence. The court rejected petitioner's contention that the Board was collaterally estopped from finding that petitioner assumed the collective bargaining agreement because the New York Supreme Court had found that petitioner did not agree to adopt that contract. Noting that "[c]ollateral estoppel does not apply to issues that were not 'essential to the judgment[,]' " the court pointed out that the New York courts found only that petitioner was not bound by the arbitration provision of the contract and "did not decide, and did not need to decide, whether [petitioner] was bound by the *other* provisions of the labor contract." *Id.* at A6 n.4 (emphasis in original).

ARGUMENT

Petitioner contends (Pet. 13-50) that the Board, upheld by the court of appeals, erred in finding that petitioner assumed J.A.R.'s collective bargaining agreement. In petitioner's view, collateral estoppel effect should have been given to the decision of the New York Supreme Court which, according to petitioner, determined that petitioner had not assumed the collective bargaining agreement. That

contention does not warrant review by this Court, and, in any event, is without merit.[4]

Petitioner does not dispute (Pet. 47) that collateral estoppel applies only when "an issue is actually and necessarily determined" in the prior proceeding. *Montana* v. *United States*, 440 U.S. 147, 153 (1979); accord, *Allbritton Communications Co.* v. *NLRB*, 766 F.2d 812, 820 (3d Cir. 1985), cert. denied, No. 85-666 (Jan. 21, 1986). Rather, petitioner challenges the conclusion of the court of appeals that the New York courts did not determine the contract assumption question. That issue, which involves only the proper characterization of the opinions of the New York state courts, does not warrant consideration by this Court.[5]

In any event, there is no merit to petitioner's contention that the Board was estopped from finding that petitioner is bound by the collective bargaining agreement. The New York Supreme Court granted petitioner's motion to vacate the arbitration notice in order to defer to the Board's resolution of the very issue that petitioner contends the court

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[4]Petitioner also contends (Pet. 50-52), citing *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), that the court of appeals erred in not remanding the case to the Board for initial determination of the collateral estoppel issue. That contention has no merit. *Chenery* did not disturb the settled rule that a decision of a lower court or administrative agency "must be affirmed if the result is correct" based upon grounds other than those relied on by the agency but which the reviewing court can itself determine are correct (*id.* at 88).

[5]Because this petition involves only the question whether collateral estoppel effect should be given to the supposed conclusion of the New York courts that petitioner did not assume the collective bargaining agreement, and not whether petitioner is a successor employer, there is no reason to hold this case for disposition in light of *Fall River Dyeing & Finishing Corp.* v. *NLRB*, No. 85-1208. That case involves the question whether the Board correctly determined that an employer was a successor employer that had a duty to bargain with the union that represented its predecessor's employees.

decided. And the Appellate Division expressly noted that the proceeding before the Board "will resolve the merits of the union's claims against [petitioner], including the latter's contention that it is not bound by J.A.R.'s contract with the Union" (446 N.Y.S.2d at 194 (see note 3, *supra*)). Moreover, as the court of appeals stated (Pet. App. A6 n.4), to the extent that the New York courts resolved any substantive issue, they resolved only the application of the arbitration clause to petitioner.[6]

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[6]In addition, the Board was not a party to, nor did it control, the state court litigation. Accordingly, it is not clear that it would be bound by the determinations of those courts in any event. *Montana*, 440 U.S. at 153, 155; see *United States* v. *East Baton Rouge Parish School Board*, 594 F.2d 56, 58 (5th Cir. 1979); cf. *United States* v. *Mendoza*, 464 U.S. 154 (1984). But compare *NLRB* v. *Heyman*, 541 F. 2d 796, 800 (9th Cir. 1976), with *Peninsula Shipbuilders' Association* v. *NLRB*, 663 F.2d 488, 492 (4th Cir. 1981), and see *Allbritton Communications Co.*, 271 N.L.R.B. 201, 202 n.4 (1984), enforced, 766 F.2d 812 (3d Cir. 1985). The court of appeals did not consider whether the Board would not be bound by the state courts' determinations because it was not a party to the state court litigation, and no question concerning that issue is presented here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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